

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

**APPLICATION FOR CERTIFICATION FOR THE
EASTSHORE ENERGY CENTER IN HAYWARD
BY TIERRA ENERGY OF TEXAS**

DOCKET No. 06-AFC-6

DENIAL OF "SECTION 1231 COMPLAINT -- ROBERT SARVEY"

Introduction and Summary

On March 6, 2008, Intervenor Robert Sarvey filed a complaint against Susan Gefter, the Hearing Officer in the Eastshore proceeding ("Sarvey Complaint"). The gravamen of the complaint is that in refusing to qualify Mr. Sarvey as an expert witness in the field of air quality, Ms. Gefter demonstrated bias and denied Mr. Sarvey an opportunity to be heard. The complaint asks for relief in the form of a new air quality hearing conducted by a different hearing officer.

We deny the complaint. Ms. Gefter demonstrated no bias, Mr. Sarvey was not harmed, and the relief sought would add nothing to the proceeding.

Background

On December 17, 2007, the Eastshore Committee held an evidentiary hearing on air quality and other issues. Before the hearing, Mr. Sarvey and other parties had submitted pre-filed, written testimony. When it was Mr. Sarvey's turn to testify, the following occurred:

HEARING OFFICER GEFTER: . . . So Mr. Sarvey, if you would like to present direct testimony now. I know that you have offered yourself as an expert witness on air quality. As you know, I haven't ever qualified you as an expert witness on air quality, however, I will qualify you as an expert intervenor and very knowledgeable in our proceedings. So if you want to, you know, be sworn in I'll take your testimony.

MR. SARVEY: I'd have to object to your not qualifying me as an expert witness. I have the educational background and the experience.

HEARING OFFICER GEFTER: I know and other hearing officers have qualified you but I won't. However, I will accept your testimony and if you want to be sworn I will swear you in.

MR. SARVEY: I'll do so under objection.

HEARING OFFICER GEFTER: Okay.

Whereupon, ROBERT SARVEY was duly sworn.

(12/17/07 RT 107:20 – 108:24.)

“Any person” may file a complaint with the Commission, “alleging a violation of a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission.” (Cal. Code Regs., tit. 20, § 1231.) The Commission's regulations specify the required contents of complaints and the procedures whereby they are considered. (*Id.*, §§ 1230 - 1237.)

Analysis

We note initially that Mr. Sarvey should have sought relief from Ms. Gefter's comments by filing a timely appeal to the full Commission. (See Cal. Code Regs., tit. 20, § 1215.) However, we will proceed on the assumption that the Sarvey Complaint is an appropriate filing.

We find nothing improper in Ms. Gefter's ruling that Mr. Sarvey did not qualify as an air quality expert. While Mr. Sarvey has considerable experience (see Ex. 800, Testimony, Declaration, and Resume of Robert Sarvey, p. 5), he has no educational or other training in the field. (See *idem.*) That other hearing officers have so qualified Mr. Sarvey is not dispositive; different decision-makers can draw different, but still reasonable, conclusions from the same facts.

Moreover, any error in Ms. Gefter's ruling would be irrelevant. The Sarvey Complaint presents no evidence or argument that specifies or explains how Mr. Sarvey has been harmed by the ruling – as might have been the case, for example, had his testimony been rejected or its weight expressly discounted. In fact, Mr. Sarvey's oral testimony was heard, and his written testimony and all exhibits he proffered were received into the record – including an exhibit that was late-filed and to which the Applicant objected. (12/17/07 RT 107:25 – 114:7; 183:18 – 184:7.) In addition, we have reviewed Mr. Sarvey's testimony and exhibits, along with all other materials in the record. Our review has been no less thorough than it would have been if Mr. Sarvey had been qualified as an air quality “expert” in the proceeding, and the issues he raises will be addressed in the Presiding Member's Proposed Decision (“PMPD”). Therefore, there is no justification for any relief.

In addition, a new hearing conducted by a different hearing officer would be a redundant waste of time. All the parties, including Mr. Sarvey, have had a full opportunity to present testimony and cross-examine the testimony of other parties, and, as we noted above, Mr. Sarvey can point to nothing in the record demonstrating that Ms. Gefter's recognition of his alleged qualification as an air quality expert would have changed anything. We also note that it is the Governor's appointees to the Energy Commission who ultimately decide which witnesses are qualified and what weight to give to testimony received in these proceedings.

The Sarvey Complaint also takes issue with statements made in the Applicant's and Staff's briefs. Those matters are clearly outside the scope of a complaint proceeding and should be (and, we are confident, will be) dealt with by Mr. Sarvey in his briefs and his comments on the PMPD.

Conclusion

The Sarvey Complaint lacks merit. It is **denied** with prejudice (i.e., no other complaint concerning the same matter may be filed). [See Cal. Code Regs., tit. 20, § 1232 subd. (a)(1).] Mr. Sarvey, may, of course, appeal this ruling to the full Commission. (See Cal. Code Regs., tit. 20, § 1215.)

Dated March 28, 2008, at Sacramento, California.

Original signed by
JEFFREY D. BYRON
Commissioner and Presiding Member
Eastshore AFC Committee